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No. 171

IN THE

Supreme Court of the United States

OCTOBER TERM, 1918.

RUST LAND & LUMBER COMPANY,
PETITIONER.

v.

ED JACKSON ET AL,
RESPONDENTS.

BRIEF FOR RESPONDENTS IN OPPOSITION TO MOTION TO GRANT WRIT OF CERTIORARI, AND ON PLEA THERETO.

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HEDERMAN BROS., JACKSON, MISS.

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RUST LAND AND LUMBER COMPANY
Petitioner

V.

ED JACKSON, ET AL
Respondents.

BRIEF IN OPPOSITION TO GRANTING WRIT OF CERTIORARI

POINT I.

The writ is barred by the lapse of time.

POINT II.

The judgment in the Supreme Court of Mississippi was against the Rust Land and Lumber Company, and the surety on its appeal bond, and the surety on a forthcoming bond against whom judgment was rendered in the circuit court, neither of whom are brought before this court by this petition.

POINT III.

Petitioners, Rust Land and Lumber Company, have no title below high water mary in Arkansas, under its settled law.

POINT IV.

The bed of all streams in Arkansas is held by the State in trust for the inhabitants; so that there could be no acquisition, thereof by petitioner.

POINT V.

After an avulsion, no title arises through accretions in the bed of the river which dries up.

POINT VI.

No Federal question decided, or if decided then it was decided in accordance with the law.

POINT VII.

Material difference upon the facts.

POINT I.

The writ is barred by the lapse of time.

The question of how to properly raise the question of prescription is here involved, and while in Brooks v. Norris, 11 How., 203, it was said by Chief Justice Taney:

> "In this case, therefore, five years had elapsed before writ of error was brought, and the limitation of it in the Act of Congress was a bar to the writ. According to the English practice, the defendant in error must avail himself of this defense by plea. He cannot take advantage of it by motion; nor can the Court judicially take notice of it, as the limitation of time is not an objection to the jurisdiction of the Court. It is a defense which the defendant in error may or may not rely upon, as he himself thinks proper. But according to the established practice of this court, he need not plead it, but may take advantage of by motion. The forms of proceeding in English Courts of Error have never been adopted or followed in this Court; and either party, without any formal assignment of error or plea, may avail himself of objection which appears upon the record itself. In this case the bar arising from lapse of time is apparent on the record, and the defendant may take advantage of it by motion to quash or dismiss the writ."

The respondents in this case have, out of abundance of caution filed formal plea under the rule as laid down in 2 R. C. L., 206, following Peterson v. Manhattan Life Insurance Co. Ill. Sup. Ct., Feby. 16, 1910,, 244 Ill., 329, and, in addition, have made a formal motion for dismissal on the same ground, in order to prevent any question of practice from thwarting their manifest right to relief.

By Section 6 of the Amendatory Act of September 6, 1916, 39 Statutes at Large, 727, it is said:

> "That no writ of error, appeal, or writ of certiorari, intending to bring up any cause for review by the Supreme Court, shall be allowed or entertained, unless duly

applied for within three months after entry of judgment or decree complained of: provided, that writs of certiorari addressed to the Supreme Court of the Phillipine Islands may be granted, if application therefor be made within six months."

This statute is mandatory and, as held in Ayres v. Tolsdorfer, 187 U. S. 595,

> "Apparently apprehending this result, Plaintiff in Error applied at the hearing, on motion and petition filed October 9th, 1902, for the writ of certiorari, as under Section 6 of the Act of March 3, 1891. Judgment was entered below December 7, 1900, and petition for rehearing denied February 23, 1901. This writ of error was brought April 15, 1901, and the record filed here and the cause docketed April 29, 1901. Under these circumstances, we must decline to entertain the application. Motion for certiorari denied. Writ of Error dismissed."

Again, in Bonnie v. Gulf Company, 198 U. S., 118, Chief Justice Fuller said:

> "The judgment was entered in the Circuit Court of Appeals May 27, 1902; this writ of error was allowed May 22, 1903; and the case was docketed here June 1, 1903. Plaintiff in error filed a petition for certiorari herein Feby 17, 1905, which was submitted February 27, and its consideration postponed to the hearing on the merits. It is our opinion that the writ should not be granted. Ayres v. Tolsdorffer, 187 U. S., 595; writ of error dismissed; certiorari denied."

As said in 3rd C. J., 343:

> "But if it is questionable whether a case should be brought up by appeal or writ of error, the case may, according to a practice sanctioned by the Federal courts and some of the State courts, be brought up by both methods, and the appellate court, when it comes to examine the case, will determine whether it is properly brought up by appeal or writ of error."

Quoting to approve, a declaration of Judge Sanborn in Lockman v. Long, 132 Fed. 1,

> "The practice of taking an appeal and a writ of error to review the same adjudication is not only permissible, but commendable in cases in which counsel have just reason to doubt which is the proper proceeding to give jurisdiction to the appellate court. In such cases the reviewing court will consider both proceedings, will dismiss that one which is ineffective and will review the ruling of the court below in accordance with the rules of the method applicable to the nature of the case before it."

But as said again in the same authority, 3rd C. J.,1046, "After an appeal or proceeding, when error has been dismissed, either voluntarily for having been taken prematurely or for defects, or want of prosecution, a second appeal may be taken if perfected within the time fixed by statute, but not otherwise."

This authority then cites therefor the following cases where the rule was applied:

Moon v. VanCuren, 49 Ind. Rep. 201:

> "An examination of the records of this court show that two appeals have been taken in this case; that both of them were dismissed for failure to file briefs; that leave was granted both times to withdraw the record; and that the case has not been reinstated. These facts constitute no avoidance of the plea It is expressly provided that no appeal shall be taken after three years. The statute commences to run from the time the final judgment is rendered, and the transcript must be filed in the office of the Clerk of this court within three years from the rendition of the judgment. The judgment was rendered on the 11th day of January, 1871, and the transcript was filed in this court on the 30th day of April, 1874. This was too late. We have no jurisdiction of the case. The reservation was only intended to prevent the dismissal from appealing as a bar to a second appeal, if the time prescribed by statute had not expired."

State Bank v. Morris, 13 Eng. Rep. 292, holds:

> "Chief Justice Watkins delivered the opinion of the court. In this case, Alexander Robinson, one of the defendants, has pleaded, in bar of the proceedings on the writ of error, that more than three years elapsed from the rendition of the judgment in his favor, and before suing out of this writ of error to reverse the same. The plaintiff has replied, in effect, that she sued out and prosecuted a writ of error to the judgment in question, within three years from its rendition; that such writ of error was quashed by this court, and that within a year from the judgment of quashal, this writ of error was sued out, and is now prosecuted. The defendant demurs to the replication. By statute, title "Practice in Supreme Court," Secs. 2 and 3, the limitation to writs of error is three years, with a saving in favor of minors, married women, persons of unsound mind, imprisoned or absent from the United States. There is no other saving or exception, by virtue of which the avoidance, sought to be set up in the replication, can be admitted. The statute which creates the limitation must also create the exception. We know of no rule of law or decision to the contrary. We are called upon by the replication to allow an exception by analogy to that contained in the general statute for the limitation of actions, when the statute itself does not extend to any action otherwise limited by any statute. Revised Statute, title "Limitation", Sec. 31.

In *People v. Turner*, 20 Cal. Reports, 142, it is held:

> "When the appeal in this case was dismissed at the October term, it was without prejudice to a second appeal. (19 Cal. 81) This reservation was not intended to give any right of which the statute had deprived the appellant. The Court could not enlarge the time for appealing. The reservation was only intended to prevent the dismissal from operating as a bar to a second appeal, if the time prescribed by statute had not expired."

In *Hewitt v. Colo. Springs* Co., 5 Colo. Rep. 184, it is held:

> "Whatever effect, therefore, a legally perfected appeal, pending at the date of the passage of the act, might have to take a case, without the rule laid down in Willoughby v. George, 1st cited, the attempted appeal in this case can have no such result. The steps taken were without authority of law, and had no effect on this appeal. The bar attached to the expiration of the 90 days, and under the constitutional provision referred to it cannot be disturbed by retrospective legislation."

Chief Justice Fuller approved this practice in Kennady v. sinot, 179 U. S., 612. *Sugar Co. v. Philippines* 247 U. S., 389.

In *Gompers v. U. S.*, 233 U. S., 604, there was an appeal, writ of error and petition for certiorari. The appeal and writ of error were dismissed and writ of certiorari granted and the judgment below reversed.

This court, had it so minded, and had the Rust Land & Lumber Company brought both certiorari and writ of error, determined this cause on the merits, without reference to form of remedy; but the Rust Land and Lumber Co. did not see fit to bring a certiorari until after two years after the rendition of the final judgment, and by the statute in that case, prescription will run. A writ of error is not amendable. If it is defective under the unanimous rulings, another writ of error may be obtained, and there is no reason for a different rule in a case of writ of error and a certiorari; but the time has elapsed and this writ therefore is not allowable.

POINT II.

The judgment in the Supreme Court of Mississippi was against the Rust Land and Lumber Company, and the surety on its appeal bond, and the surety on a forthcoming bond against whom Judgment was rendered in the circuit court, neither of whom are brought before this court by this petition.

These defects are discussed at length on the motion to dismiss or affirm and we merely make reference to them as good

and sufficient reasons why this writ of certiorari cannot be granted.

POINT III.

Petitioners, Rust Land and Lumber Company, have no title below high water mark in Arkansas, under its settled law.

This proposition is discussed at length in the companion case on the merits, and we but make reference to the brief therein for exposition of the law as contended for by us therein.

POINT IV.

The bed of all streams in Arkansas is held by the State in trust for the inhabitants; so that there could be no acquisition thereof by petitioner.

The law upon this point, as contended for by us, is collated in the principal brief, and to save prolixity, reference is made thereto.

POINT V.

After an avulsion, no title arises through accretions in the bed of the river which dries up.

This point has been fully covered in the original brief, and reference is thereunto made.

POINT VI.

No Federal question decided, or if decided then it was decided in accordance with the law.

The law upon this point, as contended for by us, has been fully discussed in our motion to dismiss or affirm, and the several briefs filed therein, reference to which is hereby made and not here inserted, to save prolixity.

POINT VII.

Material difference upon the facts.

With greatest deference, we differ materially with learned counsel for appellant, upon the facts as found by the Court in this case, and as the same appear of record; and we therefore refer the court to our briefs upon the facts in the case submitted upon the merits, where our contentions are set forth at length.

Wherefore, we respectfully submit that the petition for writ of error is barred and should be denied.

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